



# Environmental Appeal Board

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**DECISION NOS. EAB-WSA-21-A013(a), EAB-WSA-21-A014(a), EAB-WSA-21-A015(a), EAB-WSA-21-A016(a), EAB-WSA-21-A017(a), EAB-WSA-21-A018(a), EAB-WSA-21-A019(a), EAB-WSA-21-A020(a) [Group File: EAB-WSA-21-G002]**

In the matter of eight appeals under the *Water Sustainability Act*, S.B.C. 2014, c. 15

<b>BETWEEN:</b>	Gwiiyeehl (also known as Brian Williams), Niisgimiinuu (also known as Robert Campbell), Wii Muugulsxw (also known as Art Wilson), Moolaxan (also known as Norman Moore), Gwis Gyen (also known as Robin Alexander), Sakxum Hiigookw (also known as Vernon Smith), Wii Minosik (also known as Larry Skulsh), and Gitxsan Nation Crisis Management Team	<b>APPELLANTS</b>
<b>AND:</b>	Water Manager	<b>RESPONDENT</b>
<b>AND:</b>	BC Parks and Conservation Officer Service Division	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on January 25, 2022	
<b>APPEARING:</b>	For the Appellant: Sarah Hansen, Counsel  For the Respondent: Ben Naylor, Counsel Glen R. Thompson, Counsel  For the Third Party: Did not appear	

## **DECISION ON COSTS APPLICATION**

[1] This is a decision on whether the Board should order a Water Manager (the "Water Manager") appointed under the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "WSA"), to pay the costs incurred by the Appellants in an appeal before the Board. The Appellants appealed an order made by the Water Manager, who revoked the order while the appeal process was underway. The Appellants are seven

hereditary chiefs from different house groups (*wilp*) within the Gitxsan Nation, plus the Gitxsan Nation Crisis Management Team.

[2] The Appellants submit that the Water Manager should have to pay their costs because he revoked the order after undue delay, which caused the Appellants to incur unnecessary legal costs.

## **BACKGROUND**

[3] In November 2020, an unlicensed earthen berm (the "Dam") at the north end of Ross Lake sustained an uncontrolled breach. This resulted in a release of water onto Crown land.

[4] In response to this incident, the Water Manager issued three orders to the BC Parks and Conservation Service Division ("BC Parks")<sup>1</sup>.

[5] The First Order, dated November 20, 2020, required BC Parks to retain a qualified professional to plan and direct several steps of work. The First Order required water levels in Ross Lake to be lowered, while monitoring to ensure no damage to a downstream stream channel and railway. Water levels were to be lowered so that the Dam no longer retained live storage by January 8, 2021).<sup>2</sup> BC Parks was required to dig a channel through the Dam at that point so that live storage would not be required behind the Dam. This channel was to be armoured against erosion, and monitoring was to ensure no live storage of water behind the Dam.

[6] On December 15, 2020, the Water Manager wrote to BC Parks and noted that high water levels had been observed in Ross Lake, contributing to potential instability of the Dam and threatening downstream infrastructure. The Water Manager issued an order (the "Second Order"), which revoked the First Order and required BC Parks to retain a qualified professional to plan and facilitate certain work.

[7] Under the Second Order, BC Parks was required to lower the water level in Ross Lake by February 26, 2021, to markedly reduce the threat of the Dam being breached, while avoiding excessive mobilization of material downstream, and monitoring to ensure that no damage occurred to the downstream channel and railway. Once a safe water level was reached, the lake outlet was to be stabilized by March 26, 2021, so that Ross Lake's water level could be maintained within a safe range. BC Parks was to keep the outlet free of debris.

[8] On July 22, 2021, the Water Manager issued another order (the "Third Order") to BC Parks. In the Third Order, the Water Manager revoked the Second Order and required BC Parks to retain qualified professionals to plan and facilitate the work required below, while retaining a copy of the Third Order onsite:

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<sup>1</sup> The three orders referred to in this decision were issued to BC Parks because, according to those orders, BC Parks is the owner and operator of the Dam.

<sup>2</sup> Live storage refers to the water retained by a dam that could be released via outlet works, spillways, etc.

- To attain and maintain safe water levels in Ross Lake such that:
  - The outflow at the north end of the lake does not threaten the [D]am
  - Current wildlife habitat and recreational use of the lake is sustained
- Develop and implement a Monitoring and Emergency Response Plan which includes:
  - Regular, rigorous dam safety surveillance and water level monitoring on Ross Lake. This plan must increase in frequency during times of high hydrological input to the lake.
  - active, emergency procedures to draw down lake levels should water levels rise to threaten the dam. These procedures should consider the instability of the outlet creek to the north and the maximum discharge rates it can safely accept, or select an alternative, more stable outlet.
- To conduct the appropriate studies and consultations to:
  - Determine the relationship between Ross Lake water levels and water storage behind the dam.
  - Determine the range of water levels that are required to maintain the wildlife habitat and recreational functions of Ross Lake.
- To make a decision in writing to [the Water Manager], by July 29, 2022 to bring the [D]am into compliance with the [WSA] such that:
  - if the [D]am is required, a water licence is applied for the water actively stored behind the [Dam] by August 12, 2022.
  - the [D]am, if required, is rebuilt or repaired to comply with the *Dam Safety Regulation* and satisfies the requirements of the Dam Safety Officer by November 25, 2022.
  - if a [D]am is not required, the [Dam] be fully decommissioned and a stable lake outlet be established at an appropriate elevation by November 25, 2022. The lake must be dewatered to the appropriate elevation such that the unstable channel and railway infrastructure downstream are not negatively affected.

[9] On July 28, 2021, the Appellants appealed the First Order, Second Order, and Third Order. The Appellants submitted a single Notice of Appeal to begin their appeals. The Notice of Appeal asserts that the appealed orders should be changed because the decisions to issue the orders were invalid, and the Water Manager failed to adequately and meaningfully consult with and reasonably accommodate with the Appellants before issuing the orders.

[10] The Notice of Appeal was completed using the Board's Form 1. This form asks at one point, "What result are you seeking from an appeal (What do you want the Board to order at the end of the appeal?)". The Appellants wrote, "Quash and set aside the Orders ..." for the reasons set out above.

[11] On August 19, 2021, the Board sent a letter to the Appellants, the Water Manager, and BC Parks acknowledging receipt of the Notice of Appeal. In that letter, the Board invited BC Parks to participate in the appeals as a Third Party. The Board also requested that the Appellants provide clarification on the Notice of Appeal. The Board was unclear whether the Appellants were filing an appeal as a

group, or as separate individuals—in which case they needed to submit additional filing fees. The Board also noted that the First Order and Second Order appeared to have been revoked and may not have been appealed within the 30-day timeframe for filing appeals under the *WSA*. The Board requested clarification.

[12] On September 13 and 16, 2021, the Appellants responded to the Board's inquiries. The Appellants indicated that they were filing appeals individually, provided the required fees, and stated that they only wished to appeal the Third Order.

[13] On September 24, 2021, the Board wrote to all parties and raised a question of whether the Gitksan Nation Crisis Management Team had standing to appeal the Third Order. The Board also asked the Water Manager to identify for the Board any potentially affected parties, which he did on October 8, 2021.

[14] On October 13, 2021, the Board wrote to the potentially affected parties identified by the Water Manager and gave them until November 3, 2021 to indicate if they wished to participate in the appeal.

[15] On October 27, 2021, the Water Manager issued a letter (the "Letter") revoking the Third Order. In his letter, the Water Manager summarizes:

BC Parks advises that the following steps have been undertaken and are continuing with a view to development of plans to address issues associated with [the Dam], including:

- continuing studies of the hydrology, ecology, cultural values and recreational uses of Ross Lake,
- consultation efforts with potentially affected parties and interested agencies, including with the District of New Hazelton, the Canadian National Railway (CN Rail), and with the Gitksan Nation and its representatives,
- engagement with Qualified Professionals to prepare and implement plans for removal of the earth embankments on the north shore of Ross Lake, and
- ongoing cooperation and commitment to resolving concerns related to the outlet of Ross Lake.

With the required steps by BC Parks under way towards addressing the issues at [the Dam], I hereby make the decision with this letter to revoke the [Third] Order pursuant to Section 92 (2) of the [*WSA*].

[16] On November 4, 2021, the Board asked the parties for their availability for a pre-hearing conference.

[17] Also on November 4, 2021, the Water Manager advised his counsel of the revocation. Counsel for the Water Manager wrote to advise the Appellants on November 5, 2021, and attached copies of the Letter to each of those letters.

[18] On November 12, 2021, counsel for the Water Manager wrote to the Board to advise that the Water Manager had revoked the Third Order, and attached the letter to the Appellants dated November 5, 2021, and the Letter.

[19] On November 16, 2021, the Board scheduled a pre-hearing conference, which took place on December 3, 2021. In the pre-hearing conference, the Appellants confirmed they would not proceed with their appeals of the Third Order but would be requesting an order for costs.

[20] On December 29, 2021, the Appellants requested an order for costs from the Board, in the amount of \$1,416.09. This figure was calculated based on the rates described in Scale B of Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "Civil Rules").

[21] Under section 47(1)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA"), the Board may order a party to pay some or all of the appeal costs of another party or an intervener. The Board's policy is to award costs in special circumstances. This policy is set out in section 13 of the Board's *Practice and Procedure Manual* (the "Manual") and is discussed below.

[22] Under section 47.2 of the *ATA*, an order for costs cannot be made against an agent or representative of government, such as the Water Manager; an order for costs may only be made against "the government".

## **ISSUES**

[23] The issue I must decide is whether the government (the Water Manager) should be required to pay the Appellants' costs and, if so, the appropriate amount that the government should pay.

## **APPELLANTS' SUBMISSIONS**

[24] The Appellants argue that an order for costs is appropriate because of the Water Manager's delay in revoking the Third Order. The Appellants argue that a costs order would deter the Water Manager's "... casual indifference to wasting the resources of the [Board] and the Appellants."

[25] The Appellants noted that the Board has indicated that "[o]rders for costs are intended to 'deter unwanted conduct' and conduct that is 'reprehensible'." Unwanted conduct can include frivolous appeal proceedings, including where one party wastes "... the time and resources of the Board and/or other parties, participants, or interveners ...".<sup>3</sup>

[26] The Appellants also reference *Seaspan ULC v. British Columbia (Director, Environmental Management Act)* (Decision No. 2010-EMA-005(c) and 2010-EMA-006(c), September 15, 2014) [*Seaspan*]. According to the Appellants, this case

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<sup>3</sup> See *Gibsons Alliance of Business and Community Society v. Director, Environmental Management Act* (Decision No. 2017-EMA-010(d), November 29, 2019), [*Gibsons*] at paras. 16 to 35.

supports their position, because Seaspan took several months to withdraw its appeals in that case, despite the fact that no new information arose during that time, and Seaspan provided no justification for the delayed withdrawal.

[27] The Appellants say that the BC Court of Appeal reached a similar conclusion in *College of New Caledonia v. Kraft Construction Co.*, 2011 BCCA 172 [*New Caledonia*]. At paragraphs 50, the court stated that the plaintiff had "... failed to come to terms with 'the manifest deficiency of its claim, and an early stage'". At paragraph 51, the court explained that failing to do so, with all the information required to do so, was an example of "reckless indifference" that fit within the definition of "reprehensible conduct".

[28] Turning to this case, the Appellants argue that the Water Manager engaged in "reckless indifference" and "unwanted conduct" that wasted the resources of the Board and the Appellants. The Water Manager offered no explanation for why he revoked the Third Order, and did not previously change his position or offer any new information. The Appellants assert that the Water Manager, as the statutory decision-maker, should have had all relevant information when making the Third Order and should have known the deficiencies in his case at that time. The Water Manager gave no indication that he was contemplating revoking the Third Order and offered no explanation when he did so.

[29] The Appellants argue that, in the meantime, they incurred costs associated with the appeals. Legal expenses were accrued for legal counsel's attendance at a pre-hearing conference, drafting correspondence, and preparing for the appeal hearing, including by responding to questions about the Appellants' standing to appeal which were raised over one month before the Water Manager revoked the Third Order.

### **WATER MANAGER'S SUBMISSIONS**

[30] The Water Manager submits that the Board's rationale for ordering costs in *Seaspan* was connected to the Board's concern with overseeing its own process and with ensuring that appeals are conducted in a just and efficient manner. The Board rarely grants costs, and its policy is to do so where conduct has been unreasonable and/or abusive, and to encourage responsible conduct.

[31] The Water Manager also refers to other costs decisions made by the Board. He points out that costs awards are extraordinary remedies, which become appropriate when the conduct of a party significantly departs from the expected standard<sup>4</sup>. Costs orders are used to punish unreasonable or bad behaviour.<sup>5</sup> Those

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<sup>4</sup> *Gibsons Alliance of Business and Community Society and Marcia Timbres v. Director, Environmental Management Act and George Gibsons Development Ltd.*, Decision No. 2017-EMA-010(d), at para. 34-35.

<sup>5</sup> *Burgoon v. British Columbia (Ministry of Environment)*, [2010] BCEA 15, Decision No. 2005-WAT-024,025,026(c), at para. 469.

orders are used where the conduct of a party deserves rebuke, including behaviour that is improper, frivolous or vexatious, or an abuse of process.<sup>6</sup>

[32] The Water Manager summarized two examples of conduct that may attract costs orders as set out in section 13 of the Board's *Manual*: a party's failure to take steps in a timely manner to the prejudice of other parties; and, a failure to comply with an order or direction of the Board.

[33] The Water Manager says that the delay in this case was closer to that considered in *Greengen Holdings Inc. v. Regional Water Manager*, Decision No. 2009-WAT-015(a), November 19, 2015 [*Greengen*]. The Board dismissed that appeal on application by one party, raised roughly four months before the appeal hearing was to begin. The Board denied costs to the other parties. While the Board recognized that such applications should be raised as soon as possible to avoid unnecessary hearing costs to all involved, it denied the costs order because the application was raised early enough in the process that the other party suffered no prejudice "... in terms of its ability to respond to the preliminary objection, or to know the outcome of the objection well in advance of the hearing."<sup>7</sup>

[34] The Water Manager emphasizes that he revoked the Third Order while the Board was still finalizing the affected parties. This was about four weeks after the Board had "... confirmed completion by issuing an appeal number". By contrast, *Seaspan* dealt with delays measured in years, and considerably more wasted resources.

[35] The Water Manager argues that his conduct was reasonable and he acted in a timely manner. He followed the appeal process as directed by the Board and did not mislead the Board or the Appellants. He advised the Appellants when he revoked the Third Order, and the pre-hearing conference was set by the Board because they did not respond. The Water Manager says the Appellants suffered no prejudice as a result of his actions.

[36] The Water Manager adds that he revoked the Third Order while the appeal process was going on. This did not delay the appeal process. The revocation was "... a legitimate exercise of legislated authority following discussions with ... BC Parks, and was performed and communicated as quickly as possible given the Respondent's capacity." The Water Manager says the Appellants were not entitled to prior notice of the revocation.

[37] Furthermore, the Water Manager says that the Appellants contributed to expense and delay in the proceedings by submitting an incomplete Notice of Appeal, such that the Board needed to clarify information. The Board also raised questions about the standing of the Gitxsan Nation Crisis Management Team. The Water Manager says that these were appeal-related issues that had nothing to do with the revocation, and prolonged the process, resulting in expenses for the Appellants. The Water Manager emphasizes he did not need to inform the

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<sup>6</sup> *Delfresh Mushroom Farm Ltd. v. Director, Environmental Management Act*, Decision No. 2019-EMA-009(a), at para. 129.

<sup>7</sup> See paragraph 69.

Appellants about his internal decision-making processes that led to the revocation of the Third Order.

[38] Citing *Seaspan*, the Water Manager also says the Board has considered whether imposing an order for costs will create a “chilling effect”. In this case, the Water Manager says there could be three such effects. The first would be on the legitimate exercise of legislated authority, which the Board has stated is consistent with its policies.<sup>8</sup> The second would be on the abandonment or withdrawal of appeals in appropriate circumstances, including where there are legitimate government objectives to revoke orders, or as part of settlement processes. The third would be on appeals, as the Crown (government) may feel compelled to try to recoup its costs from appellants on unsuccessful appeals.

[39] Furthermore, in the alternative, the Water Manager argues that if costs are awarded, they should be based on Scale A of the *Supreme Court Civil Rules*, not Scale B, as the activities outlined by the Appellants were of little or less than ordinary difficulty.

### **APPELLANTS’ REPLY**

[40] The Appellants say that the Water Manager’s conduct is not excused simply because he was exercising legislative authority. It was his conduct during the appeal proceedings that is the question, and the Board has the authority to enforce its own procedures and objectives.

[41] The Appellants say that the defects in the Third Order were apparent from when the Appellants first filed the Notice of Appeal. Nothing changed about their position, and yet the Water Manager failed to promptly act upon the deficiencies in his position.

[42] The Appellants also argue that it is unreasonable to say that the Water Manager should not be ordered to pay costs because of “minor administrative discrepancies.” The Appellants also say that the Water Manager revoked the Third Order well after the completion of the Notice of Appeal, and that delay had nothing to do with any action by the Appellants.

[43] The Appellants say *Greengen* is not similar to the circumstances of this case. *Greengen* related to the late filing of an objection to the Board’s jurisdiction, whereas here the issue is the Water Manager’s delay in withdrawing his position despite having all of the information necessary to make that decision earlier, which caused the Appellants and the Board to incur additional expenses. This situation is closer to the one in *Seaspan*.

[44] The Appellants recognize that the Board may be wary of disincentivizing appeals from unsophisticated parties through orders for costs, as discussed in *Seaspan*, at para. 195. The Appellants say that would not be a concern here,

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<sup>8</sup> See, for example, *Liu v. Deputy Director, Fish and Wildlife Branch*, Decision No. 2018-WIL-001(a), at para. 122.



however, as the Water Manager is a sophisticated party that should be held to a relatively high standard of conduct.

[45] The Appellants say that it is irrelevant that the Water Manager followed proper appeal procedures; the basis for costs is that he delayed withdrawing his position when he knew, or ought to have known, that his position was unsound. This wasted the time and resources of the Board and the Appellants, something the Board described as unwanted conduct at paragraph 34 of *Gibsons*.

[46] The Appellants say that "... the decision in *Seaspan* encourages parties to attempt to resolve appeals in an expedient fashion ...", adding "... if there is a delay in a party withdrawing their position, the Board in *Seaspan* states that adequate reasons must be given for that delay." The Water Manager's Letter provided no explanation, but suggests that the revocation was because BC Parks was abiding by the Third Order, which the Appellants say is insufficient reason for the revocation. The Appellants assert that the Water Manager has provided no new information that he knew or ought to have known, that caused him to change his position months after receiving the Notice of Appeal. Any such information should have been disclosed prior to issuing the Third Order.

[47] With respect to the "chilling effect" described by the Water Manager, the Appellants say that imposing a costs order because of the Water Manager's undue delay in this case would have nothing to do with the Crown (government) recovering costs in other appeals. They emphasize that costs are not payable based on the outcome of an appeal. The Appellants add that a costs award in this case would encourage individuals to pursue legitimate appeals because they would be less concerned about the Crown (government) wasting their resources.

## **DECISION AND ANALYSIS**

[48] As noted above, subsection 47(1)(a) of the *ATA* allows the Board to order a party to pay some or all of the appeal costs of another party or an intervener. This subsection does not provide further guidance on how the Board ought to exercise this discretion, although subsection 47(1)(c) allows the Board to order a party or intervener to pay some or all of the Board's costs and expenses if the conduct of that party or intervener has been "... improper, vexatious, frivolous, or abusive ...".

[49] Reading section 47 as a whole, it is clear that the Board has a wider range of discretion when ordering one party to pay some or all of the costs of another party or intervener, than it does when ordering a party or intervener to pay some or all of the Board's costs and expenses. The Board has a longstanding policy to exercise its discretion only in "special circumstances", as highlighted by the parties in this case.

[50] The Board's *Manual* lists six situations that might amount to "special circumstances". This list is non-exhaustive, as acknowledged by the parties; however, it is a useful starting point when considering the Board's discretion on this issue.

[51] The only situation in the list that may be relevant in this case is "... where the action of a party/participant/intervener to, or the failure of a party/participant/intervener to act in a timely manner, results in prejudice to any of

the other parties/participants/interveners". It is significant that the Board described delay as an example of "special circumstances" that might attract a costs order only where the delay "... results in prejudice to any of the other parties/participants/interveners."

[52] This is not to say that prejudice is an absolute requirement for a costs order. It may be that "special circumstances" worthy of rebuke or sanction by the Board would not involve prejudice to another party, but as a matter of general practice, as set out in the *Manual*, prejudice would be required. The Appellants seem to recognize as much, framing their argument in terms of not only the Water Manager's delay, but also on the impact this had on the Appellants and the Board, in allegedly wasting resources.

[53] In light of that guidance from the *Manual*, I will consider whether the Appellants were prejudiced as a result of any delay caused by the Water Manager.

[54] The first step in my analysis is to consider what delay the Appellants are alleging. They do not allege that the Water Manager delayed in following any direction of the Board or in communicating the Letter revoking the Third Order. The Appellants are critical of the Water Manager for not revoking the Third Order before he did.

[55] I find that a critical assumption underlies the Appellants' argument: that the Water Manager revoked the Third Order because it was somehow flawed. The Appellants presented no persuasive evidence to support that conclusion. The Letter provides the Water Manager's reasons for revoking the Third Order. I disagree with the Appellants that the Water Manager provided no reasons to explain the revocation, and I disagree with the assumption that the Appellants made, that the Water Manager revoked the Third Order because of some flaw in it.

[56] Based on my review of the Letter, I find that the Water Manager revoked the Third Order because BC Parks was studying the hydrology, ecology, cultural values, and recreational uses of Ross Lake; was consulting with various bodies, including the Gitksan Nation; had engaged qualified professionals to remove the Dam; and were demonstrating cooperation to resolve the Water Manager's concerns about the Dam and Ross Lake. Based on this information, I conclude that circumstances, and the actions taken by BC Parks, continued to develop between the time when the Water Manager issued the Third Order and when he revoked it.

[57] Accordingly, I find that the previous decisions of the Board that are discussed by the Appellants, *New Caledonia* and *Seaspan*, are distinguishable from the present case. While both of those previous decisions discuss costs orders generally in a way that is consistent with the Board's ongoing approach to handling these orders, the factual circumstances in both relate to parties failing to promptly recognize flaws in their cases. This is not the case here; the Water Manager did not revoke the Third Order because of some flaw in it.

[58] Some of the Appellants' submissions seem to recognize this motivation. They argue that the Water Manager revoked the Third Order because BC Parks was complying with it. According to the Appellants, it was inappropriate to revoke the Third Order in those circumstances. I will not comment on this argument, beyond

noting that there is no dispute that the Water Manager was acting within his statutory authority to revoke the Third Order. Section 92(2) of the *WSA* states that a water manager may “at any time” amend or revoke an order of a water manager. I also note that the Appellants could have appealed his decision to revoke the Third Order, and they did not do so. In any case, in deciding the present application, it is not the Board’s place to comment on a decision that was not appealed. The issue in this case is whether the Water Manager delayed in revoking the Third Order, as the Appellants argue, causing the Appellants to incur unnecessary legal costs.

[59] The concept of delay requires there to be an opportunity for, and an expectation of, something being done. In this case, the Appellants argue that the Water Manager should have known that there was no basis for the Third Order in the first place; however, I have already concluded that the Water Manager did not revoke the Third Order because it was flawed in some way, but because of a change in the circumstances and the progress BC Parks was making with respect to the Dam. No information is available to suggest when these changes occurred, and I am unable to determine whether there was any delay between that point in time and when the Water Manager revoked the Third Order.

[60] The Appellants bear the burden of proof in this application, as they are seeking a remedy from the Board. The Appellants provided insufficient information to allow me to conclude that there was any delay on the part of the Water Manager when he revoked the Third Order.

[61] Even if the Water Manager had engaged in some delay, I find that the prejudice to the Appellants would have been minor, considering both the outcome of the appeal and the appeal process.

[62] In that regard, I find that the outcome of the appeal was not prejudicial to the Appellants. The Water Manager’s decision to revoke the Third Order essentially gave the Appellants what they sought in their Notice of Appeal: the Third Order is no longer valid and has been set aside. The Appellants were asked if they wished to proceed with their appeals on the revoked Third Order during the pre-hearing conference, and they said they did not. For these reasons, I conclude that the Appellants received the outcome they wanted from the appeal process.

[63] Next, I turn to the appeal process itself, and whether the Water Manager caused unreasonable delay or otherwise behaved in a manner that would justify an order of costs.

[64] I find that there was no prejudice to the Appellants once counsel for the Water Manager informed them, on November 5, 2021, that the Third Order had been revoked. At that point, the Appellants had not provided their availability for the pre-hearing conference. The only matter left to decide was whether the Appellants would pursue appeals that were moot because the Third Order had been revoked, or if they would abandon their appeals. Any delay in the process from that point on cannot be attributed to the Water Manager or his counsel.

[65] Having addressed the appeal process from November 5, 2021, onward, I consider the process leading up to that date. After the Appellants filed the Notice of Appeal, the Board required clarification on whether the Appellants were appealing

individually or as a group, and on whether the Appellants were intending to appeal the First Order and the Second Order as well as the Third Order. The Appellants clarified those issues on September 13, 2021. The Board then continued with its standard appeal process: identifying a possible standing issue, requesting information on potentially affected parties, and setting a time for a case management conference after consulting with the parties on their schedules.

[66] As the Water Manager notes, none of these procedural steps were related to his decision to revoke the Third Order. If the appeal had proceeded, these steps would have been required in any event, and are not related to any delay on the part of the Water Manager. It would be inappropriate to attribute to the Water Manager legal costs resulting from the Appellants:

- filing an incomplete Notice of Appeal,
- filing appeals of multiple orders before abandoning their appeals of all but one of those orders, and
- preparing for a case management conference while knowing that the order under appeal had been revoked.

[67] The Appellants are responsible for their costs associated with the Board asking them to complete their Notice of Appeal and clarify which order(s) they were appealing. Furthermore, the legal costs associated with the case management conference are only indirectly related to any delay on the Water Manager's part in revoking the Third Order. The Appellants have not provided me with any persuasive argument to support a finding that such an indirect relationship between a delay and the resulting legal costs is sufficient to attract an award for costs.

[68] Even if this indirect relationship was sufficient to give rise to a costs order, I do not consider the Water Manager's conduct to be reprehensible, irresponsible, or abusive, or to amount to "unwanted conduct". I do not consider the Water Manager's conduct to depart from the expected standard, or to be unreasonable, frivolous, vexatious, or an abuse of process. I agree with the Water Manager that, of the cases cited to me, *Greengen* is the most similar to this one. Here, the Water Manager continued to assess whether the circumstances and BC Park's conduct continued to merit the existence of the Third Order. A point in time came when he decided that the Third Order was unnecessary and he revoked it. The Water Manager considered new information and decided to revoke the Third Order.

[69] If there was any delay in obtaining and reacting to this new information, it was a matter of days, weeks, or perhaps months. During this time, in the normal course, there would be little or no wasted resources resulting to other parties or to the Board. In this case, because of issues related to the Appellants' management of their case, there were some wasted resources. This unfolded during preliminary stages of the appeal process, before the Board had received responses from potentially affected persons who might become additional parties or participants in the appeals. As in *Greengen*, I find that a delay of days, weeks, or months during preliminary processes, as in this case, where the only file activity was related to the Board defining parties or participants and clarifying who was an Appellant and what was being appealed, does not reach the level of unreasonable, irresponsible,

reprehensible, abusive, or otherwise unwanted conduct. Rather, the Water Manager revoked the Third Order, giving the Appellants the outcome that they wanted from their appeals, at a preliminary phase of the appeal. The appeals concluded well before the parties were even defined or disclosure of information was complete. I consider that any preparation for an appeal hearing at this stage would have been preliminary or premature.

[70] It is also significant that, based on the evidence before me, the Appellants have not established that the Third Order was flawed, and the Water Manager has not acceded to that argument. I cannot conclude that the Water Manager's case was frivolous, vexatious, or would have been so flawed as to merit a costs order against him. *Seaspan* provides a good example of circumstances where a costs order was appropriate based on a party advancing deeply flawed arguments leading up to, and in the early phases of, an oral hearing. It is even harder to show, given that the Water Manager saved all concerned the expense associated with a hearing, that a costs award would be appropriate in these circumstances. The Appellants have failed to do so.

[71] This point is consistent with a previous decision from the Board, summarized in *Seaspan: Spike Investments Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)*, [2003] B.C.E.A. No. 41 (Q.L.), Decision No. 2003-WAS-003(b), November 21, 2003) [*Spike*]. In *Spike*, the appellant received an expert report 33 days before a scheduled hearing and reviewed that report with its expert witness the evening before the hearing. Spike decided to abandon its appeal after considering this information. The Board declined to issue a costs order, stating that the appellant in that case did not wait an unreasonable amount of time before reviewing the report in question. The Board found that a costs order would be inappropriate because the appellant in that case saved the Board and the other parties to the costs associated with attending the scheduled hearing.

[72] Furthermore, and finally, I agree that granting the Appellants' application in this case would create an undesirable "chilling effect", at least in part, as described by the Water Manager. Such an order would give statutory decision-makers pause in exercising their responsibilities, particularly where the revocation of orders is concerned. The Board encourages the early resolution of appeals, even if the appeal is resolved by revoking the decision under appeal.

[73] While the Appellants argue that a costs order in this case may serve to encourage legitimate appeals, I do not consider orders for costs to be a suitable vehicle to do so. The Board must consider whether it will produce a "chilling effect" on conduct it wishes to encourage when deciding whether to issue a costs order. This is a different matter than encouraging meritorious appeals (as would, for example, costs that follow the outcome of the appeal, or that offer some multiplier on the rate in the *Supreme Court Civil Rules*, neither of which are practices endorsed by the Board).

[74] For the reasons above, I find that there are no special circumstances in this case that would warrant an order of costs, and I deny the Appellants' request for a costs order against the Water Manager. As a result, I do not need to address the amount of costs requested.

**CONCLUSION**

[75] I have considered all facts presented and all submissions made, whether or not I have specifically referenced them in this decision.

[76] For the reasons provided above, I find that the Water Manager should not be required to pay the Appellants' costs.

[77] The Appellants' application is denied.

"Darrell Le Houillier"

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Darrell Le Houillier, Chair  
Environmental Appeal Board

February 16, 2022